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EX PARTE OR LATE FILED

May 25, 2001

Via Hand Delivery

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Statement of Joint CLEC Parties
Reform of Access Charges Imposed by Competitive Local Exchange Carriers
CC Docket No. 96-262

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Business Telecom, Inc. ("BTI") ; Cbeyond Communications, LLC ("Cbeyond"); Talk America Holdings ("Talk America"); WinStar Communications ("WinStar") and Z-Tel Communications ("Z-Tel") (collectively, the "Joint Parties"), submit this notice in the above-captioned docketed proceedings of a written *ex parte* presentation.

Attached is copy of the Joint Parties' statement in response to the Commission's April 27, 2001 order regulating CLEC access charges. In the statement, the Joint Parties demonstrate that it is currently impossible for the parties – and for most, if not all CLECs – to comply with that provision of the Order requiring CLECs to set and bill access charges on a metropolitan statistical area-specific basis. The Joint Parties ask the Commission to stay the effective date of the Order on its own motion until it can address this issue and correct deficiencies in the record of the proceeding.

Pursuant to the Commission's rules, the Joint Parties submit an original and one copy of this written *ex parte* notification and attachment for inclusion in the public record of the above-

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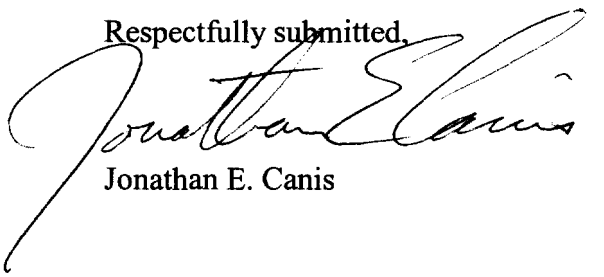
referenced proceedings. If you have any questions or need additional information, please contact me at (202) 955-9664.

Respectfully submitted,



Jonathan E. Canis

Enclosure

cc: Dorothy Attwood, Chief, Common Carrier Bureau
Jeffrey Dygert, Assistant Bureau Chief, Common Carrier Bureau
Glenn Reynolds, Associate Bureau Chief, Common Carrier Bureau
Richard Lerner, Deputy Chief, Competitive Pricing Bureau
International Transcription Service

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May 25, 2001

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Written *Ex Parte* Statement of Joint CLEC Parties
Reform of Access Charges Imposed by Competitive Local Exchange Carriers
CC Docket No. 96-262

Dear Ms. Attwood:

This written *ex parte* statement, submitted on behalf of Business Telecom, Inc. ("BTI") ; Cbeyond Communications, LLC ("Cbeyond"); Talk America Holdings ("Talk America"); WinStar Communications ("WinStar") and Z-Tel Communications ("Z-Tel") (collectively, the "Joint Parties"), raises several practical and legal issues with respect the adoption of the Commission's Seventh Report and Order in the above referenced docket, released April 27, 2001.[1] Specifically, this *ex parte* addresses the rule which restricts the availability of the Commission's transitional benchmark access rate to those metropolitan statistical area ("MSAs") where CLECs are actually serving end users as of the effective date of the *Order*.[2] Provided herewith are declarations attesting to the impossibility of implementing the new MSA rule by June 20, 2001, the currently-scheduled effective date of the *Order*.[3] These

1 *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, ¶ 58 (April 27, 2001) ("*Order*").

2 Hereinafter "new MSA rule."

3 *See* 66 Fed. Reg. 27892 (May 21, 2001).

declarations cure an absence of comment on this issue in the record of this proceeding and address the lack of discussion in the record. As set forth below, we urge the Commission to voluntarily stay the effectiveness of the *Order*.

I. IT WOULD BE IMPOSSIBLE TO IMPLEMENT THE NEW MSA RULE BY THE EFFECTIVE DATE OF THE ORDER

In its *Order* the Commission adopted a tariff benchmark rate for CLEC interstate switched access rates that may be charged by a particular CLEC by tariff to the lower of: (1) 2.5¢ per minute, or (2) the lowest rate that a CLEC has tariffed for access, during the 6 months immediately preceding the effective date of the *Order*.[4] The Commission concluded that "any rate above this level (unless it is still below the competing ILEC's rate) will be conclusively deemed to be unreasonable in any proceeding challenging the rate."[5] However, the Commission concluded that the benchmark rate should be available only in areas where CLEC was actually serving customers as of the effective date of the *Order*. The Commission's justification for adoption of this rule was its finding "that it is prudent to permit CLECs to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules" in light of the "historical ability of CLECs to tariff access rates well above the prevailing ILEC rate may have contributed to economically inefficient market entry by certain CLECs."[6] Specifically, the Commission restricted "the availability of the transitional benchmark rate to those MSAs in which CLECs are actually serving end users on the effective date of these rules." In MSAs where CLECs begin serving customers *after* the effective date of the *Order*, the Commission concluded that CLECs may tariff rates only equivalent to those of the competing ILEC.[7]

As demonstrated in the attached declarations, the "new MSA" rule would, as a practical matter, be impossible to implement by the June 20, 2001, the effective date of this *Order*. As they are currently configured, CLEC carrier access billing systems ("CABS") are incapable of billing different rates on an MSA-specific basis. Had the Commission put this issue out for comment, it certainly would have received extensive information demonstrating this to be the case. However, the record of the proceeding leading to the adoption of this *Order* does not contain consideration of the technical abilities of CLECs to comply with this *Order*, and no discussion of the cost or time that it would take to modify CLEC billing systems to allow for such billing practices, if indeed such modifications are practicable. As discussed herein, the vast majority of CLECs bill their services at rates set on a state-specific basis, and have no need to set rates on a more geographically disaggregated basis. As a result, CLEC billing systems are

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4 *Order*, ¶ 56.

5 *Order*, ¶ 57.

6 *Order*, ¶ 58.

7 *Order*, ¶ 58.

incapable of billing rates that differ on an MSA by MSA basis. Furthermore, modifying those systems in order to provide for MSA by MSA billing functionality would require an investment in time and money that is as of yet undetermined.

The Joint Parties append to this ex parte statement declarations attesting that their CABS systems are not currently capable of billing rates on an MSA-specific basis. While these attached declarations provide the beginning of a record on which the Commission could make an assessment regarding the ability of CLECs to comply with its MSA rule, it is abundantly clear that it is impossible for most – if not all – CLECs to implement the new MSA rule on a flash-cut basis on June 20, 2001. Furthermore, as set forth below, the lack of discussion of the new MSA rule in the existing record of this proceeding makes clear that adoption of the new MSA rule on the existing record constitutes a violation of the APA. Voluntarily staying the order on its own motion would provide the Commission time to shore up the record on this issue, and to establish the commitment in time and money that would be necessary for CLECs to establish MSA-specific billing. To the extent that the Commission eventually decides to adopt a new MSA rule on a refreshed record, the Commission should provide CLECs with adequate time to transition to such a system.[8]

II. ADOPTION OF THE NEW MSA RULE IN THIS ORDER VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Commission's adoption of the new MSA rule on the constitutes a violation of the APA in that the Commission did not provide adequate notice and comment on the rule restricting applicability of the conclusively reasonable benchmark access rate to those MSAs where a CLEC actually provides service to end users prior to the effective date of the Commission's *Order*. The APA (specifically 5 U.S.C. § 553(b)(3)) requires that "general notice of proposed rule making shall be published in the Federal Register," and shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[9] The Commission's adoption of the "new MSA" restriction rule did not comply with the APA's notice and comment requirements.

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8 There is ample precedent under which the Commission has by its own motion issued temporary stays of its orders to provide affected carriers with adequate time to comply. One of the most recent examples involves the implementation of the Commission's rules mandating the elimination of federal tariffs for interexchange traffic. After the Commission's rules mandating detariffing took effect, AT&T, WorldCom and others argued that they needed additional time to transition their tariffed services to contracts. The Commission ultimately delayed the implementation of its mandatory detariffing order by 15 months. *See e.g.* Public Notice: "Common Carrier Bureau Extends Transition Period for Detariffing Consumer Domestic Long Distance Services," DA 01-282, CC Docket No. 96-61 (Feb. 5, 2001) (Extending nine-month transition period to 15 months).

9 5 U.S.C. § 553(b)(3).

The Court of Appeals for the District of Columbia Circuit has interpreted the APA's notice requirements to serve three basic purposes: (1) improving the quality of agency rulemaking by testing proposed rules through exposure to public comments; (2) providing an opportunity to be heard, "which is basic to fundamental fairness"; and (3) allowing affected parties to develop a record of objections for judicial review.[10] Accordingly, agency notice "must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making."[11] The Commission cannot claim that an exception to the APA's notice and comment rules is applicable here.[12]

The notice of proposed rulemakings that led to the adoption of the *Order* did not expressly describe the subjects and issues involved with "new MSA restriction" in connection with the Commission's proposal to adopt a benchmark CLEC access rate, nor did commenters propose such a rule. Indeed, while the Commission expressly sought comment on a wide variety of issues, including the reasonableness of CLEC access charges, the lawfulness of refusing to carry access traffic, the establishment of a benchmark access rate, and potential detariffing of CLEC access services, the Commission did not expressly seek comment on the MSA restriction rule — nor can we find any instance in the record where the implementation of such a rule was debated.

The courts have consistently held that "a general request for comments is not adequate notice of a proposed rule change. Interested parties are unable to participate meaningfully in the rulemaking process without some notice of the direction in which the agency proposed to go."[13] The failure of the Commission to make known agency views at the time of publication of notice "circumvents the APA notice requirements" because "proposed rule changes cannot be tested when the public is unaware of both the proposed revision and the theory under which the agency makes its proposal."[14]

The dearth of comment on the record of this proceeding regarding the new MSA rule indicates that even one diligently monitoring the comments and *ex partes* associated with this docket could not have reasonably commented on this issue.[15] While the adoption of a CLEC

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10 *See United Church Board for World Ministries v. S.E.C.*, 617 F.Supp. 837 (D.C.D.C. 1985) ("*United Church*").

11 *Id.*, at 839.

12 *See Reeder v. F.C.C.*, 865 F.2d 1289 (D.C. Cir. 1989) ("The APA's procedural rule exception is to be construed very narrowly, and it does not apply where the agency 'encodes a substantive value judgment.'").

13 *See Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977).

14 *See United Church, 617 F. Supp. at 840.*

15 *See United Church*, 839-840. See id. at 839-840.

benchmark was clearly raised in previous notices, the *Order* itself was the only identifiable instance in which the new MSA restriction was raised. There, the Commission merely provided justification for adopting the rule, stating that it felt it "important to ensure that this transitional mechanism serves that purpose, rather than presenting CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC."[16] As courts have observed, "when interested parties are unaware that a rulemaking process will result in specific regulations, the purposes of the APA notice requirements cannot be served."[17]

Had the Commission expressly indicated that it was considering adoption of the rule exempting new MSAs from the applicable benchmarked switched access rate, the record of the proceeding would have contained a spirited debate regarding the proposed rule. The Joint Parties' declarations appended to this ex parte are testimony to the fact that notice of the MSA restriction would have generated considerable comment over how – and if – such restriction could be implemented. To date, however, there has been no opportunity for affected parties to apprise the Commission of the practical, technical and economic impact of the new MSA rule.

III. CONCLUSION: THE COMMISSION SHOULD VOLUNTARILY STAY THE EFFECTIVENESS OF THE ORDER

As the attached declarations indicate, it would be a practical and technical impossibility for CLECs to implement the new MSA rule by June 20, the effective date of the *Order*. Accordingly, the Commission should voluntarily stay the effectiveness of the *Order* until

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16 *Order*, ¶ 58.

17 *See United Church*, 617 F. Supp. at 841.

it can determine whether the MSA rule should be modified or eliminated.[18] To assist in this decision, the Commission may find it necessary to solicit comment from interested parties.

Respectfully submitted,

Jonathan E. Canis
Ross A. Buntrock

[18] A temporary stay of the *Order* would also ensure that other actions that the Commission may take in response to an issue referred to the Commission by the Federal District Court for the Eastern District Virginia are fully consistent with the *Order*.

DECLARATION
OF
PAMELA MARIA SCHAARD
BUSINESS TELECOM INC.

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform,	)	**CC Docket 96-262**
Reform of Access Charges Imposed	)	
By Competitive Local Exchange Carriers	)	

DECLARATION OF PAMELA MARIA SCHAARD

1. My name is Pamela Maria Schaard. I currently serve as Vice President of Information Services for Business Telecom, Inc., ("BTI").

2. BTI is a competitive local exchange carrier ("CLEC") with headquarters located at 4300 Six Forks Road, Raleigh, North Carolina.

3. The purpose of my Declaration is to detail the problems associated with BTI's implementation of the provisions of the Commission's Seventh Report and Order, FCC 01-146 ("Order") in the above-referenced docket requiring carriers to bill customers on an MSA-by-MSA basis by June 20, 2001.

4. The June 20, 2001 effective date of the Order does not allow BTI sufficient time to develop the necessary billing system to accommodate the Commission's MSA-specific billing regime.

5. Currently, the CABS billing system BTI utilizes, which is based on industry standards, is set up to provide billing detail on a state by state basis.

6. Compliance with the Commission's Order would require BTI to consume scarce resources and does not allow for a prescribed advance notice in order to implement the billing of different rates on an MSA-specific basis within a narrow timeframe.

7. As a practical matter, BTI cannot implement the Commission's Order by June 20, 2001. Therefore, BTI respectfully requests that the Commission voluntarily stay its Order.

8. This concludes my Declaration.

I affirm that the above information is true and correct to the best of my knowledge and belief.

Pamela Maria Schaard

Pamela Maria Schaard

Executed this 25th day of May, 2001

DECLARATION
OF
JULIA STROW
CBEYOND COMMUNICATIONS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform,	)	**CC Docket 96-262**
Reform of Access Charges Imposed	)	
By Competitive Local Exchange Carriers	)	

DECLARATION OF JULIA O. STROW

1. My name is Julia O. Strow. My business address is 320 Interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.

2. I am employed as Vice President-Regulatory Affairs by Cbeyond Communications, LLC ("Cbeyond").

3. Cbeyond is a facilities-based Broadband Applications Services Provider ("BASP"), focusing on "bridging the digital divide" using Internet Protocol (IP) architecture to bring all the communication services that a small business needs at affordable prices typically only available to large enterprises. Cbeyond provides an integrated product of local, long distance, Internet access and Internet-based applications such as Unified Messaging, Email, E-Commerce and Web Hosting. The business strategy is to facilitate the movement of business processes via Internet access, making possible electronic communication, collaboration and e-commerce opportunities that will drive the customer's competitive strength and efficiency. Cbeyond uses an integrated IP-based architecture and delivers converged voice, data and integrated network applications over a single platform with seamless integration and delivery.

4. The purpose of my Declaration is to detail the problems associated with my Company's implementation of the provisions of the Commission's Seventh Report and Order, FCC 01-146 ("Order") in the above-referenced docket requiring carriers to bill customers on an MSA-by-MSA basis by June 20, 2001.

5. The June 20, 2001 effective date of the Order does not allow Cbeyond sufficient time to develop the necessary billing system to accommodate the Commission's MSA-specific billing regime.

6. The Commission's Order requires Cbeyond, and all CLECs, to make substantial investment, and consume scarce resources, in order to implement the billing of different rates on an MSA-specific basis within a narrow timeframe.

7. As a practical matter, Cbeyond cannot implement the Commission's Order by June 20, 2001. Therefore, Cbeyond respectfully requests that the Commission voluntarily stay its Order.

8. This concludes my Declaration.

I affirm that the above information is true and correct to the best of my knowledge and belief.

Julia O. Strow by RAB

Julia O. Strow

Executed this 25th day of May, 2001

DECLARATION
OF
ALAN KIRK
TALK AMERICA HOLDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform,	)	CC Docket 96-262
Reform of Access Charges Imposed	)	
By Competitive Local Exchange Carriers	)	

DECLARATION OF ALAN KIRK

1. My name is Alan Kirk. I am over the age of 21, of sound mind and competent to testify to the matters stated herein.

2. I am Director of Product Development at Talk America Holdings. I have personal knowledge of capabilities and limitations of the Carrier Access Billing Systems used by Talk America Holdings. My business address is 12020 Sunrise Valley Dr. Suite 250 Reston, Virginia 20191.

3. Talk America's current access billing system has been designed to be consistent with current industry compliant OSS systems and based on the practice of establishing and tariffing rates at the state level vis-à-vis by MSA. The introduction of an MSA-based billing structure would constitute a wholesale change to the way that the telecommunications industry operates.

4. Talk America's carrier access billing systems ("CABS") are incapable of billing different rates on an MSA-specific basis. The OSS development required to introduce these capabilities by June 20, 2001 would constitute an unreasonable burden on Talk America's financial and management resources.

5. This concludes my Declaration.

I affirm that the above information is true and correct to the best of my knowledge and belief.

Alan Kirk

Executed this 25th day of May, 2001

DECLARATION
OF
STEVE MURRAY
WINSTAR COMMUNICATIONS

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform,	)	**CC Docket 96-262**
Reform of Access Charges Imposed	)	
By Competitive Local Exchange Carriers	)	

DECLARATION OF STEPHEN V. MURRAY

1. My name is Stephen V. Murray. I serve as Senior Director, State Regulatory & Interconnection Negotiation for WinStar Communications, Inc. ("Winstar").

2. WinStar is a competitive local exchange carrier ("CLEC") offering facilities-based local, long distance, data, and Internet services to small and mid-sized business customers throughout the United States. WinStar began deploying its integrated switched network in the Fall of 1996 and currently serves approximately 40 markets nationally over its own facilities.

3. The purpose of my Declaration is to address the problems associated with WinStar's implementation of the provisions of the Commission's Seventh Report and Order, FCC 01-146 ("Order") in the above-referenced docket requiring carriers to bill customers on an MSA-by-MSA basis by June 20, 2001.

4. The June 20, 2001 effective date of the Order does not allow WinStar sufficient time to develop the necessary billing system modifications to accommodate the Commission's MSA-specific billing regime.

5. Currently, WinStar's CABS billing system, which is based on industry standards, is set up to provide billing detail on a state by state basis and at the present time is not capable of billing on an MSA by MSA basis.

6. WinStar's billing system does not currently have the ability to bill on an MSA by MSA basis, as required by the Commission's Order, and WinStar has not yet assessed the technical feasibility or costs associated with building a CABS system with MSA by MSA billing functionality.

7. Compliance with the Commission's Order would require WinStar to make substantial financial investment, and would consume scarce resources, in order to implement the billing of different rates on an MSA-specific basis within a narrow timeframe.

8. As a practical matter, WinStar cannot implement the Commission's Order by June 20, 2001. Therefore, WinStar respectfully requests that the Commission voluntarily stay its Order.

9. This concludes my Declaration.

I affirm that the above information is true and correct to the best of my knowledge and belief.

Stephen V. Murray by KAB

Stephen V. Murray

Executed this 25th day of May, 2001

DECLARATION
OF
DONALD DAVIS
Z-TEL COMMUNICATIONS

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Access Charge Reform,	)	CC Docket 96-262
Reform of Access Charges Imposed	)	
By Competitive Local Exchange Carriers	)	

DECLARATION OF DONALD C. DAVIS

1. My name is Donald C. Davis. I currently serve as Vice President—Strategic Planning and Industry Policy for Z-Tel Communications, Inc. ("Z-Tel").

2. Z-Tel is a Tampa, Florida-based competitive local exchange carrier ("CLEC") that offers bundled packages of local, long distance, and enhanced services to residential customers using the combination of unbundled network elements ("UNEs") known as the UNE Platform, or "UNE-P." As of April 1, Z-Tel was providing integrated local, long distance, and enhanced services to more than 370,000 residential consumers across the United States. Z-Tel fully expects to provide service to thousands of additional consumers in every state in which Z-Tel has a meaningful opportunity to compete.

3. The purpose of my Declaration is to detail the problems associated with Z-Tel's implementation of the provisions of the Commission's Seventh Report and Order, FCC 01-146 ("Order") in the above-referenced docket requiring carriers to bill customers on an MSA-by-MSA basis by June 20, 2001.

4. The June 20, 2001 effective date of the Order does not allow Z-Tel sufficient time to develop the necessary billing system to accommodate the Commission's MSA-specific billing regime.

5. Currently, Z-Tel's CABS billing system, which is based on industry standards, is set up to provide billing detail on a state by state basis and at the present time is not capable of billing on an MSA by MSA basis.

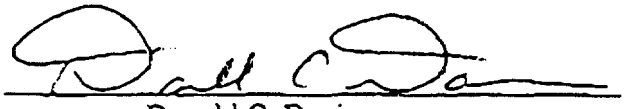
6. Z-Tel's billing system is not built to provide the level of billing granularity required by the Commission's Order, and Z-Tel has not yet assessed the technical feasibility or costs associated with building a CABS system with MSA by MSA billing functionality.

7. Compliance with the Commission's Order would require Z-Tel to make substantial financial investment, and would consume scarce resources, in order to implement the billing of different rates on an MSA-specific basis within a narrow timeframe.

8. As a practical matter, Z-Tel cannot implement the Commission's Order by June 20, 2001. Therefore, Z-Tel respectfully requests that the Commission voluntarily stay its Order.

9. This concludes my Declaration.

I affirm that the above information is true and correct to the best of my knowledge and belief.



Donald C. Davis

Executed this 25th day of May, 2001